In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1468

RENE TEXEIRA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the trial court improperly restricted the cross-examination of a key government witness. Petitioner Rene Texeira also contends that the court's failure to rule on his proposed jury instructions before his closing argument was reversible error under Rule 30, Fed. R. Crim. P.

After a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of conspiracy to traffic in heroin, in violation of 21 U.S.C. (1964 ed.) 173, 174. Petitioners Rene Texeira and Justino Texeira were sentenced to twenty years' imprisonment, and petitioner Francis Texeira was sentenced to fifteen years'

imprisonment. The court of appeals affirmed without opinion.

Pamela Ramirez testified that in 1968, she began selling heroin for her uncles, petitioners Rene and Justino Texeira (Tr. 16-20). In 1969, Ramirez and others began helping petitioners "bag up" heroin. This operation involved first diluting heroin and then putting five dollars worth of the mixture in an individual bag (Tr. 20-23, 27, 37-38, 235-238, 398-399). Ramirez and others also acted as couriers for petitioners on several occasions, taking "bagged up" heroin from New York City to New Orleans, Louisiana (Tr. 24-26, 27-31, 33-34, 238-241).

1. Petitioners' contention that the trial court improperly restricted the cross-examination of Pamela Ramirez is without merit.

During the course of her cross-examination, petitioners sought to ask Pamela Ramirez whether she was aware that the petitioners were subject to five-year mandatory sentences if convicted. Petitioners argued that this evidence would show the motive Ramirez had for testifying for the government by establishing the penalties she would have faced if prosecuted with petitioners. The court sustained the government's objection, stating that the penalties petitioners faced were none of the jury's concern (Tr. 107, 108).

This ruling by the court was correct. Petitioners had already elicited from the witness the fact that she was cooperating with the government in return for an agreement not to prosecute her, her mother and her sister on charges growing out of the same offenses as those of the petitioners. She had also testified that she hoped to obtain a reduction of the sentence she and her husband were facing on other unrelated drug charges.

Ramirez had thus clearly indicated that her motive for testifying was in large part self-protective. Asking her if she was aware of the penalties petitioners faced if convicted was simply another way of covering the same ground; at the same time, it would improperly have informed the jury of the penalties that petitioners faced.

A similar situation occurred later in the trial, when Ramirez was being questioned about state charges involving possession of narcotics. She admitted that she was awaiting sentencing on those charges, thus indicating that she had a motive to cooperate with the prosecution in the instant case. The court sustained a government objection to a question asking what type of felony possession was. Ramirez had already fully discussed the pending state charges she faced, and any further discussion of the type of felony involved would merely have been cumulative (Tr. 162-163).

The limits of cross-examination to show bias and motivation lie within the sound discretion of the trial court. *United States* v. *Blackwood*, 456 F. 2d 526, 529 (C.A. 2); *United States* v. *Daddano*, 432 F. 2d 1119, 1128 (C.A. 7), certiorari denied, 402 U.S. 905; *Tinker* v. *United States*, 417 F. 2d 542, 544 (C.A. D.C.), certiorari denied, 396 U.S. 864; *United States* v. *Stacey*, 452 F. 2d 1204 (C.A. 5). There is no abuse where the "jury was otherwise in possession of sufficient information concerning formative events to make a 'discriminating appraisal' of a witness' motives and bias." *United States* v. *Campbell*, 426 F. 2d 547, 550 (C.A. 2). Such was the case here.

2. Petitioner Rene Texeira's contention that the trial court's failure to comply with Rule 30,[1] constitutes reversi-

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[1]Rule 30 was intended to prevent a defendant from arguing a theory of defense to the jury only to have the court then refuse to give an instruction in that area. It reads as follows:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may

ble error despite the lack of any evidence that petitioners were prejudiced, is incorrect.

Prior to his closing argument, counsel for petitioner Rene Texeira asked the trial court which of his requested instructions it intended to grant. The court responded that it was not possible to decide at that time, and counsel raised no objection (Tr. 579). When the court made its decision on the requested instructions, it granted in substance all of petitioner Rene Texeira's requests (Tr. 647). No objection was made to the decision.

Courts have consistently held that the defendant must show prejudice in order to require a reversal for failure to comply with Rule 30. The party must show that he was unduly or unfairly prevented from making his argument to the jury or was substantially misled by the court's action or inaction in formulating his argument. *Whitlock* v. *United States*, 429 F. 2d 942, 945-946 (C.A. 10); *Walker* v. *United States*, 418 F. 2d 1116, 1118-1119 (C.A. D.C.); *United States* v. *Kroncke*, 459 F. 2d 697, 705 (C.A. 8); *United States* v. *Mendoza*, 473 F. 2d 697, 700-701 (C.A.

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file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

5); *Wright v. United States*, 339 F. 2d 578, 579-580 (C.A. 9). Here, there was no evidence of any prejudice to petitioner by the court's failure to comply with Rule 30.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1974.